

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION

EQUAL EMPLOYMENT )  
OPPORTUNITY COMMISSION, )  
 )  
Plaintiff, )  
 ) No. 3:05-CV-01928-M  
vs. )  
 )  
BOBRICH ENTERPRISES d/b/a )  
SUBWAY, )  
 )  
Defendant. )

PRETRIAL CONFERENCE  
BEFORE THE HONORABLE BARBARA M. G. LYNN  
UNITED STATES DISTRICT JUDGE  
April 2, 2007

A P P E A R A N C E S

For the Plaintiff:

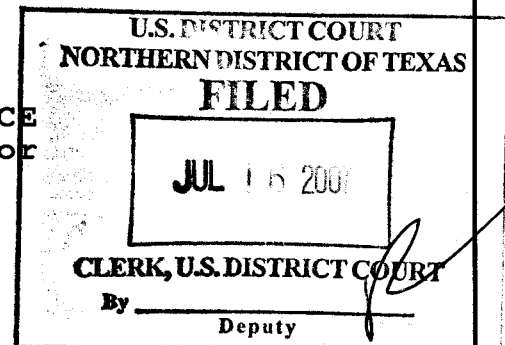
EEOC - DALLAS DISTRICT OFFICE  
207 South Houston - 3rd Floor  
Dallas, TX 75202  
(214)253-2740  
BY: SUZANNE M. ANDERSON

For the Defendant:

SULLIVAN & COOK  
2301 Cedar Springs Road - Suite 200  
Dallas, TX 75201  
(214)520-7494  
BY: JEFFREY E. COOK

COURT REPORTER: SHAWNIE ARCHULETA, TX CCR No. 7533  
1100 Commerce Street  
Dallas, Texas 75242

proceedings reported by mechanical stenography,  
transcript produced by computer.



SHAWNIE ARCHULETA, CSR/CRR  
FEDERAL COURT REPORTER - 214.753.2747

1 THE COURT: Good afternoon.

2 MS. ANDERSON: Good afternoon, Your Honor.

3 MR. COOK: Good afternoon, Your Honor.

4 THE COURT: All right. The Court is here

5 to conduct a pretrial in the matter of EEOC v.

6 Bobrich Enterprises, Case Number 05-CV-1928.

7 First of all, I have reviewed the pretrial  
8 order and I have signed it. That will be entered.

9 I have received your trial briefs today.  
10 I have not had but a very abbreviated time to review  
11 those, so I'm not sure I'm going to be in a position  
12 to rule on those today or not, but we will talk it  
13 through.

14 Let me begin by talking about the  
15 schedule. Here's the situation: I'm in trial in  
16 Baton Rouge starting tomorrow. I thought I would be  
17 in trial through Friday, but I'm not going to be in  
18 session on Friday because I'm advised that I have  
19 too many jurors who can't be in session on Friday,  
20 given that it's Good Friday. So I'm not going to be  
21 in session on Friday. We're picking the jury and  
22 conducting opening statements tomorrow, so it's  
23 touch and go whether I finish this week or not.

24 If I don't finish and I have to go back on  
25 Monday, then there's no way I'm going to get to you.

1 If I finish this week, then we'll start on Monday,  
2 and we can go Monday, Tuesday, and Wednesday. On  
3 Tuesday, we would not take a lunch break, and we'll  
4 go until about 2:30 and just break. That's only  
5 going to end up costing you about an hour with  
6 skipping lunch and not having the afternoon recess.

7 So do you all think you can finish in that  
8 amount of time?

9 MS. ANDERSON: I'm not sure, Your Honor.  
10 I mean we have talked about -- counsel and I have  
11 talked about finishing in the three days. You know,  
12 I think we can do it, but we're not -- the two of us  
13 are not convinced. And we do have witnesses coming  
14 in from Minnesota and from Oklahoma.

15 THE COURT: That's why I gave you all  
16 notice of this, because I knew this was going to be  
17 an issue.

18 MS. ANDERSON: Absolutely.

19 MR. COOK: Your Honor, I think it's  
20 possible we will finish in three days, but there are  
21 15 witnesses listed and quite a few exhibits. I  
22 think it is very touch and go as to whether that  
23 will happen.

24 THE COURT: The problem we've got is that  
25 if you're not finished -- I tell you what, let me

1 take a 15-second break and grab something so I will  
2 have a calendar in front of me.

3 (Pause in the proceedings.)

4 THE COURT: The difficulty I've got is  
5 this: If you all are not -- if you've not started  
6 and finished between the 9th and the 11th, I can't  
7 continue you because I either have conflicting  
8 criminal matters, including one specially-set  
9 criminal case, or I am out of town for meetings that  
10 I can't miss. So that's it. I can't -- and the  
11 time when I could get back to you would be so far  
12 off from that that there's no way I would hold a  
13 jury.

14 So if you all can't be sure that you can  
15 finish, then I'm not going to have a choice but to  
16 reset you. Or I can see if someone else can try the  
17 case in my absence, which I'm happy to do.

18 MR. COOK: Your Honor, under those  
19 choices, I would vote for reset and have my calendar  
20 here with just a couple of exceptions and do it when  
21 you say.

22 THE COURT: The difficulty I have is my  
23 courtroom deputy is out sick today, so the chances  
24 are if I tried to do it I would mess it up. I will  
25 hear from you all so I can have guidance from you.

1 MS. ANDERSON: EEOC, we would also agree  
2 to have it reset.

3 THE COURT: Okay. You would rather have  
4 it reset than having someone else try it?

5 MS. ANDERSON: Yes, Your Honor.

6 THE COURT: I'm flattered. I'm not sure  
7 why I feel that, but I am.

8 So give me your preferences, then, as to  
9 when. I'm not saying I can honor those, but give me  
10 your respective preferences, and you all can think  
11 about that for a minute, subject to witnesses, I  
12 understand that.

13 MR. COOK: Do you want to go first?

14 MS. ANDERSON: The conflicts I have, Your  
15 Honor --

16 THE COURT: Just don't even try for May.

17 MS. ANDERSON: Yeah, May is no good.

18 THE COURT: Okay.

19 MS. ANDERSON: And the other conflict, I  
20 have a trial starting July 9th in the Western  
21 District of Oklahoma. They're pretty good about  
22 when they set you that you go. So that's a pretty  
23 likely trial to start on July 9th. But that's only  
24 a -- that's a five-day trial.

25 THE COURT: Okay.

1 MR. COOK: Your Honor, at the end of that  
2 week that begins July 9th, we're doing a family  
3 vacation and we'll be gone the end of that week and  
4 through the following week. So if you took out the  
5 9th and the 16th, you would address her issue with  
6 the trial and my issue with my family trip, and then  
7 I am good up until the last week of August. Other  
8 than that two-week period, I don't have anything  
9 that you wouldn't trump.

10 THE COURT: Okay. So the end of July and  
11 end of August.

12 MR. COOK: Yes, Your Honor.

13 THE COURT: Okay. I will let y'all know  
14 that as soon as I can. Should we go ahead and  
15 proceed as far as we can get today, or do you want  
16 to reschedule the pretrial?

17 MR. COOK: Your Honor, rescheduling might  
18 make some sense. Suzanne and I continue to talk  
19 about certain issues. We might be able to refine  
20 things.

21 THE COURT: Okay. That's fine. Let's  
22 just cover a few things here preliminarily. With  
23 respect to -- let me just give y'all some idea of  
24 how I do things.

25 You both were furnished with a

1 questionnaire, I understand, and I got proposed  
2 comments for the questionnaire from the defendant.  
3 I didn't get any from the EEOC. Are there any  
4 questions that the EEOC would like to add to the  
5 questionnaire or change on the questionnaire?

6 MS. ANDERSON: Your Honor, the only  
7 questions we would like to add might be too specific  
8 for the questionnaire, but we would request  
9 questions related to, have you ever owned your own  
10 business? Do you have --

11 THE COURT: I had -- hold on a minute. I  
12 had marked your submission with some things that I  
13 would propose to put on the questionnaire. I will,  
14 of course, call out the names of all the witnesses.

15 I don't have any problem putting, of  
16 yours, Questions 5, 6, 7 and 8 on the questionnaire,  
17 Plaintiff's 5, 6, 7 and 8, and that's it.

18 Does the -- excuse me. 31 and 32 in  
19 another form are pretty much there already, as is 9.

20 Does the defense have any objection to my  
21 including 5 through 8 on the questionnaire?

22 MR. COOK: No, Your Honor.

23 THE COURT: All right. Does the plaintiff  
24 have any objection to my including the proposed  
25 additions that the defense counsel has proposed?

1 MS. ANDERSON: No, Your Honor.

2 THE COURT: All right. Okay. Then those  
3 additions will be made to the questionnaire.

4 Now, I conduct voir dire, and then I will  
5 let you all conduct voir dire. I won't make you say  
6 this today since we're not going soon, but I will  
7 ask you how much time each of you want for voir dire  
8 and how much you want for opening statements. So if  
9 you can agree on that, the chances are you're likely  
10 to get what you want from me.

11 On the plaintiff's proposed questions, I  
12 am likely to cover 1, 2, 3, 4, 16 -- maybe not in  
13 exactly that form, but -- 30 and 33, but not quite  
14 that way. So the rest of those will be up to you to  
15 ask if you wish.

16 As far as the defendant is concerned, I  
17 will ask 1, but not necessarily in that form; 2,  
18 again not necessarily in that precise form; and the  
19 others are for you.

20 We generally start at 8:30 and go until  
21 5:00. If the jury wants to change the schedule,  
22 starting earlier or going a little bit later, I will  
23 accommodate them. Sometimes I have people who need  
24 to adjourn earlier because they have  
25 responsibilities at home, and we will take care of



1 that as needed.

2           You can bring bottled water into the  
3 courtroom, and I will give the jury water. The  
4 jurors can take notes if they wish. I will ask you  
5 if you want to agree that the jurors may ask  
6 questions. If you agree to that, this is the way I  
7 do it: The jurors, if they have a question, will  
8 write it down, pass it to the court security  
9 officer -- I will encourage them to do that during  
10 breaks -- but if they have a question that they want  
11 answered, then they will do it then. They are not  
12 to identify themselves on the question. If I know  
13 who they are, I won't tell you.

14           And I will call you up to the bench or  
15 during a break, just read the question to you, and  
16 then you may do what you wish with it. I won't put  
17 a question to a witness. Well, you can put a  
18 question to the witness, but you won't say this is a  
19 question from the jury. In other words, if that's  
20 something that you want to develop, either of you,  
21 then you may develop it. So it's basically just a  
22 free look into something that the jurors want to  
23 know.

24           Most of the time it's very much  
25 underutilized. They hardly ever ask questions.

1 When they do, it's usually one person. And it's  
2 usually something that is confusing to them, they  
3 don't understand the sequence or they missed who  
4 somebody is, but it's sort of a freebie look. But I  
5 will not impose it upon you if you both don't agree  
6 to do it.

7 MR. COOK: Do you want to know that now?

8 THE COURT: If you want to think about it,  
9 you can. It's not urgent that I know that now. I  
10 think people have generally found it to be helpful  
11 and not a problem, but it's up to you.

12 I will probably seat -- I will either seat  
13 seven or eight, I'm going to be thinking about that.  
14 If we're in the summer, I will probably seat eight  
15 because things happen more often during the summer  
16 that there's something comes up that someone becomes  
17 unavailable. And of course, in federal court, any  
18 alternate becomes a regular juror. So if they're  
19 all there, then you will have eight people.

20 We usually take an hour and a quarter for  
21 lunch and we have two 15- to 20-minute recesses  
22 mid-morning and mid-afternoon.

23 You will ask my permission to approach the  
24 witness the first time, and then you will have it  
25 for the balance of the witness. You don't have to

1 repeatedly ask me. If you want to show the witness  
2 something, you can approach the witness to do that.  
3 Don't lurk. When you're done with the document go  
4 back to start. I'm not going to tie you with a  
5 short leash to the lectern, you can move about a  
6 little bit, but don't get too close to the jury.  
7 When you make your opening statements, you can turn  
8 the lectern toward the jury.

9 If you're using any overheads or blowups,  
10 make sure that you come in here and try them out.  
11 The lighting in here turns everything to a shade of  
12 gray that makes it difficult to see unless the  
13 screen is enormous. So I'm happy to have you  
14 arrange with the court security officer to come in  
15 the courtroom and try anything out that you want to  
16 use.

17 Jurors complain routinely that what  
18 lawyers think is big enough for them to see is too  
19 small for them to read. You want to look at the  
20 lines of sight in here, which are somewhat  
21 difficult, to make sure that everyone can see.  
22 Usually for the jurors to be able to see, I can't  
23 see. That's okay. If you want me to look at it,  
24 just give me a small version of it and that will be  
25 fine. If you don't care if I see it or not, that's

1 fine, too.

2 If a witness needs to get up and  
3 demonstrate something or point to something, that's  
4 fine. Just ask me permission, and I will give it to  
5 you. You're responsible for the exhibits and the  
6 marking of them. When you are done with them, put  
7 them on the table here. I will keep up with them,  
8 but you keep up with what's been admitted and not  
9 admitted.

10 My court reporter doesn't mark exhibits,  
11 she just -- you mark them in advance, and I will  
12 preadmit anything that you all want me to. If you  
13 all agree on something being admissible and we can  
14 save some time by my admitting it before, then let's  
15 do that.

16 If there are evidentiary issues that you  
17 see coming, I would like to take those up before the  
18 jury comes in or during a break. I don't like to  
19 send them back to the jury room unless I absolutely  
20 have to. I don't like surprises, so if you see  
21 something coming, let me know. If you are going to  
22 use demonstrative aids during opening statement,  
23 show them to opposing counsel so if there is a  
24 problem with that I will know about it.

25 You are required to tell opposing counsel

1 the lineup for the witnesses for the following day  
2 by the end of the day before.

3 I'm not going to rule on deposition  
4 excerpts before trial because they're hardly ever  
5 actually offered, and I waste a lot of time reading  
6 them. If you know you are going to use them,  
7 however, what I want you to do is mark them up for  
8 me, highlight in one color -- I don't care what  
9 color as long as you tell me what color you're  
10 using -- the offering party's designation, and then  
11 in another color the objections. And if the  
12 objection was not required to be made at the time,  
13 then you will just write there what the objection is  
14 that's contained in the materials that have been  
15 filed and I will take it home and read it and make  
16 my rulings before court starts.

17 Anything else that you all want to know  
18 now?

19 MR. COOK: One question, Your Honor, with  
20 respect to the voir dire process. How much going  
21 into the facts is allowed by us, if any?

22 THE COURT: Well, you can tell the jury  
23 what your contentions are. This isn't state court  
24 voir dire and you're not going to argue your case in  
25 the voir dire. But I will allow you to tell them

1 enough so that you can reasonably ascertain whether  
2 they have some knowledge or orientation that you  
3 think would make them not a fair and impartial  
4 juror.

5 MR. COOK: Thank you, Your Honor.

6 THE COURT: I will know when you've gone  
7 too far when I hear you go too far. It's hard for  
8 me to answer the question in the abstract. I hope  
9 that's helpful.

10 All the jurors will get their own copies  
11 of the charge -- and I charge the jury before  
12 closing argument -- and they can make notes on the  
13 charge. And you can put up on the overhead any  
14 portion of the charge that you want, including the  
15 proposed questions, which will at that time be the  
16 questions, and what you propose to be the answers.

17 With respect to the trial briefs, my  
18 inclination is to overrule both motions in limine to  
19 which the briefs are addressed. That is to allow  
20 the defense to question the plaintiff as to these  
21 examples of being less than truthful and the -- not  
22 allowing these defenses to be asserted, given the  
23 individuals who are charged with wrongdoing. But  
24 that's a preliminary ruling.

25 I will permit each of you to respond to

1 the briefs that were submitted today. No replies.  
2 You all can make your responsive argument when you  
3 see me. And I will, if -- I will either -- well,  
4 let me revise that, because I'm not likely to see  
5 you all again until the day of, and I think you will  
6 want to know this in advance, so I will permit a  
7 brief reply. Let's go ahead and brief this out as  
8 if it were a motion briefing schedule. So each of  
9 you may, if you wish, respond to the motions in  
10 limine, and then if the movant wishes to reply, you  
11 may do that.

12 Is there anything else that you all would  
13 like for me to rule on today?

14 MR. COOK: No, Your Honor.

15 MS. ANDERSON: Your Honor, just a point of  
16 clarification so that I understand it.

17 Defendant filed today a trial brief, which  
18 was a response to the motion in limine that the EEOC  
19 filed. So EEOC can now file a reply to that?

20 THE COURT: Yes, you may. Hold on just a  
21 second, let me check something here.

22 Yes. I guess that now that I'm refreshing  
23 my memory about the matter, I guess that once I have  
24 your reply, that will be the end of the briefing  
25 since you've already briefed it initially.

1 MS. ANDERSON: And EEOC should follow the  
2 local rules with respect to a reply brief as to when  
3 it's due and the page numbering?

4 THE COURT: Yes, that's correct.

5 MS. ANDERSON: Great. Thank you.

6 THE COURT: I don't really have any  
7 briefing from the defendant on the Ellerth Faragher  
8 issue, so you may respond to that and then the EEOC  
9 may file a reply on that. Okay?

10 MR. COOK: Yes, Your Honor.

11 Your Honor, I have thought of one  
12 question. So I'm crystal clear, are both sides okay  
13 to tell our witnesses we're definitely off for next  
14 week?

15 THE COURT: Yes.

16 MR. COOK: Do you have a guess as to when  
17 we will hear when it's reset to?

18 THE COURT: You will hear this week. Yes,  
19 on the assumption that Lori, my courtroom deputy is  
20 back. Even though I will not be here, I will leave  
21 some instructions with her about what we're talking  
22 about date-wise, and I can be reached by her in  
23 Louisiana. So we should be able to get that taken  
24 care of this week.

25 And if you have any dates, when you talk



1 to witnesses, that you need to supplement what you  
2 have told me, just call my office and say so.

3 With respect to the other limine items,  
4 are you all still talking about that, so you don't  
5 want me to rule on those now?

6 MR. COOK: Well, we have continued to  
7 talk, Your Honor, as recently as before we came in  
8 here. I think it's fair to say we will probably  
9 keep doing that, particularly since the briefing  
10 will be exchanged some more.

11 THE COURT: That's fine. And let me know  
12 where you all are, and I will ask you to come in or  
13 I will conduct a telephone conference on the  
14 remaining limine items.

15 I think that probably covers what we need  
16 to do today unless you have things by way of  
17 exhibits that you want me to take care of today.

18 MR. COOK: Not --

19 THE COURT: Let's go off the record.

20 (Pause in the proceedings.)

21 THE COURT: Let me also make sure I  
22 understand the plaintiff's name. Ms. Gitsham's name  
23 is Gitsham today?

24 MS. ANDERSON: Yes, Your Honor. Her name  
25 is now Tammy Gitsham.

1 THE COURT: And her name when she worked  
2 for the defendant?

3 MS. ANDERSON: Her name was Tammy Flatte  
4 when she began working for the defendant. She got  
5 married during her employment and her name changed  
6 to Tammy Cataldi.

7 THE COURT: And now is Gitsham. Is she  
8 remarried?

9 MS. ANDERSON: Yes, Your Honor.

10 THE COURT: So was she single when she  
11 worked for the defendant?

12 MS. ANDERSON: She was single when she  
13 first started working there, then she married.

14 THE COURT: Mr. Cataldi.

15 MS. ANDERSON: Yes.

16 THE COURT: Then was divorced.

17 MS. ANDERSON: They separated while she  
18 was working there. She moved to Oklahoma sometime  
19 later and married again.

20 THE COURT: Okay. And was never working  
21 for the defendant as Ms. Gitsham.

22 MS. ANDERSON: No.

23 THE COURT: All right. Anything else that  
24 I can help you all with at this point?

25 MR. COOK: No. Thank you, Judge.

1 THE COURT: I'm sorry for the difficulties  
2 with the scheduling. As I say, I saw this coming,  
3 and I gave everybody on that docket the opportunity  
4 to stay or go, and I think you all were the only  
5 ones to stay. But if you're not going to finish in  
6 three days and you don't know for sure, I just can't  
7 afford to keep you there. So we will find another  
8 place for you, and I will let you know as soon as I  
9 can when that will be.

10 MR. COOK: Thank you, Your Honor.

11 THE COURT: Thank you very much.

12 (The proceedings concluded at 3:08 p.m.)  
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C E R T I F I C A T E

I, Shawnie Archuleta, CCR/CRR, certify  
that the foregoing is a transcript from the record  
of the proceedings in the foregoing entitled matter.

I further certify that the transcript fees  
format comply with those prescribed by the Court and  
the Judicial Conference of the United States.

This 12th day of July 2007.

  
Shawnie Archuleta CCR No. 7533  
Official Court Reporter  
The Northern District of Texas  
Dallas Division

My CSR license expires: December 31, 2007

Business address: 1100 Commerce Street  
Dallas, TX 75242

Telephone Number: 214.753.2747

**SHAWNIE ARCHULETA, CSR/CRR  
FEDERAL COURT REPORTER - 214.753.2747**